someone in the firm, either a principal or a subordinate. Even if it were necessary for the prosecution to prove guilty knowledge the cases establish that such knowledge on the part of a subordinate would be sufficient to make the principal liable in a charge of this description. As the Magistrate took that view, I think that a fine of $500/- was not excessive but inasmuch as this has been in the nature of a test case under the section and the appellant has incurred considerable expense I feel justified in reducing the fine to $250. The appeal will be dismissed, but the sentence varied accordingly. The order confiscating the rubber will stand.

Appeal dismissed.
Sentence varied.

Solicitors for the appellant—*Chan & Eber.*

[ORIGINAL CIVIL JURISDICTION]
Mundell, Ag.J.
September 24, 1936.
[APPELLATE CIVIL JURISDICTION]
McElwaine, C.J.
Whitley & Clark, JJ.
December 15, 1936

S. RENGASAMY PILLAY & ANOR..... (Plaintiffs-Appellants)

vs.

SADHU PAKIRSWAMY.....(Defendant-Respondent)

[SINGAPORE SUIT No. 528 of 1933]
[SINGAPORE APPEAL No. 6 of 1936]

Practice—parties—ejectment proceedings—joinder of executors as plaintiffs.

In a suit to recover possession of a testator's property all proving executors must be joined as plaintiffs.

APPEAL against an order of Mundell, Ag. J., dated September 24, 1936. The appeal was heard before McElwaine, C.J., Whitley and Clark, JJ. on the 15th day of December, 1936. The facts and arguments sufficiently appear from the judgment of the Court of Appeal.

Withers Payne for Plaintiffs-Appellants.

Johannes (*Davies* with him) for the Defendant-Respondent.

MUNDELL, J.—In this case the Plaintiffs—the two Executors of the Will of one M. Sidambram Pillay, who died on the 2nd April 1925, seek to recover from the Defendant possession of part of a piece of land near Silat Road Singapore, which on the 26th November 1912, had, with other land, been conveyed by one Lim Peng Siang to M. Sidambram Pillay—they also claim mesne profits of the land from the 31st May, 1931 until possession is delivered to them.

The Plaintiffs, as I understand their Statement of Claim, base their claim on 3 grounds—

First—That in February, 1931 the Defendant became tenant to the 1st Plaintiff of the land in dispute, and that his tenancy was determined on the 31st May 1931, by notice to quit given in April, 1931.

Secondly—That up to the time of his death in April, 1925 M. Sidambram Pillay was in possession of the land in dispute and that the Defendant was subsequently found in possession, and

Thirdly—That M. Sidambram Pillay had a good title to the land, and that the defendant has not acquired a title thereto by adverse possession.

The first and second grounds appeared in the Statement of Claim filed on the 13th February, 1936—the third ground was added by amendment of the Statement of Claim at the trial, but no application was then, or at any subsequent time, made to amend the Statement of Claim in respect of the relief which the Plaintiffs have asked for.

In answer, the Defendant has pleaded his possession of the land in dispute and has alleged that such possession has been in uninterrupted posssession for upwards of 19 years, or alternatively for 14 years; the Defendant also relies on Ordinance No. 56 (Limitation).

[His Lordship, after dealing with the submissions of Counsel and the evidence established in this case which were not in question in the appeal, proceeded as follows:—]

As the writ in this suit was filed on the 27th June 1935, it would appear *prima facie.* that the suit was brought within time, but Mr. Johannes has argued that whatever be the period at which the occupation of the Defendant is found to have commenced, time must, for the purposes of limitation, be reckoned up to the 17th July 1936. when the second Plaintiff was added as a Plaintiff in this suit. He contended that if there is more than one executor, all the Executors who are of full age must join in bringing an action such as the present, and he found his argument on English Common Law, on Section 21 of Ordinance 56 (Limitation), and on the decision in *Seerangathuni* v. *B. V. Mudaliar*, reported in 1921, 40 Madras L. J. p. 532, and in A.I.R. 1921, Madras, at p. 528. That case was a case for recovery of possession of land, and adverse possession was set up as a defence. The suit was commenced by one of two executors before the period of limitation had expired, and the other executor was joined, as a defendant in the proceedings, *after* the period of limitation had expired; it was held that the whole suit was barred.

I am aware that the Courts of this Colony have not always followed Indian decisions, but it is desirable that the Courts of the Empire should dispense justice on the same principles, and as Section 21 of our Limitation Ordinance is, in my view, *in pari materi* with section 22 of the Indian Limitation Act, and as the decision referred to is a decision of the Court of Appeal in Madras, I feel that I am bound to follow it, unless in the present case, circumstances exist which differentiate it from the case now under consideration.

Dr. Withers Payne has argued that there are such circumstances. He referred to the case of *Drage* v. *Hartopp*, reported in 28 Ch. Div., page 414, in which it was held that an executor out of the jurisdiction of the Court was not a necessary party to proceedings brought on behalf of a testator's estate, and he says that there is evidence in the present case that the second Plaintiff is out of the jurisdiction, and that his whereabouts are unknown.

The facts in *Drage* v. *Hartopp* were rather exceptional, and I do not think that that case can be relied on as authority for the general proposition that it is unnecessary to join an executor who is out of the jurisdiction—in my view it is little more than an authority for the proposition that it is unnecessary to join an executor as a party, if the circumstances be such that to join him, is almost an impossibility.

In the present case I do not think that the Plaintiffs can be heard to say that any real difficulty existed in making the 2nd Plaintiff a party, for as soon as objection was taken because he had not been joined, he was made a party. I think therefore it is safe to assume that little if any difficulty was experienced in 1936. I do not see why any greater difficulty should have arisen when the action was commenced in 1933, because the 1st Plaintiff said that in 1932 and 1933 he was in India, that he had often met the 2nd Plaintiff there, and that he last saw him in 1932 or 1933.

Dr. Withers Payne also sought to differentiate the present case upon the ground that the Defendant took no objection to the 2nd Plaintiff not being a party until very late in the proceedings, and he relied on the case of *Hazari* v. *Bhawani*, reported in 30 I.L.R. at p. 538. He further argued that in the present case the Defendant had become a tenant to the 1st Plaintiff by submitting to the first distress, and that consequently the 2nd Plaintiff was an unnecessary party, as the 1st Plaintiff could sue alone.

As regards the first of these two submissions I do not see how, from the endorsement of the writ alone, the Defendant could have known that the 1st Plaintiff was not the only necessary party. He should have known this as soon as the Statement of Claim was filed, but this was not filed until the 13th *February* this year, and having regard to these circumstances, I do not think the objection to the 2nd Plaintiff's absence was taken at an unduly late stage of the proceedings.

As regards the second submission, I think there would have been much to say in its favour if the present claim had been limited to a claim against the defendant as a tenant holding over after his tenancy had been determined by notice to quit, but I have already decided that the Plaintiffs have no right to relief upon the ground that the Defendant was a tenant, and I think the 2nd Plaintiff is a necessary party to these proceedings in so far as the Plaintiffs' claim is not based on the allegation that the Defendant was a tenant.

In these circumstances, I do not think there is any sufficient reason to differentiate this case from the case of *Seerangathuni* v. *B. V. Mudaliar*, and I therefore hold that this suit was not properly constituted until the 17th July 1936, and that for the purposes of limitation, time must be deemed to have been running up to that date.

[The rest of the Judgment deals with the question whether the acts of the Plaintiffs put an end to the running of time or created an estoppel in defendant's favour.]

Claim dismissed.

The plaintiffs appealed. The Court of Appeal (**McELWAINE, C.J., WHITLEY AND ADRIAN CLARK, JJ.**), upheld the decision of Mundell, Ag. J. and delivered the following judgment dismissing the appeal:—

By a conveyance dated 26th November, 1912, certain land in the district of Telok Blangah in the Island of Singapore was conveyed in fee simple free from all encumbrances to Moona Sidambaram Pillay who died on 2nd April, 1925, without having disposed of the said land in his lifetime.

By his will dated the 27th March, 1925, Moona Sidambaram Pillay appointed S. Rengasamy Pillay and Ravena Mana Nagappa Pillay his executors. Each of these persons took out probate of the will.

The present action is for possession and mesne profits of a portion of the land conveyed by the conveyance of 26th November, 1912, upon which the defendant had been in occupation without title.

The action was commenced by writ issued on 27th June, 1933, by S. Rengasamy Pillay suing as one of the executors of the said Moona Sidambaram Pillay.

After the defence had been filed the defendant's solicitor wrote to the Plaintiff's solicitor pointing out that the second executor should be a party.

The Plaintiff's solicitor accepted this view and took out a summons on 14th July, 1936, praying for an Order that the second executor Ravena Mana Navena Nagappa Pillay be added as a plaintiff. The application was supported by an affidavit of the plaintiff, Rengasamy Pillay in which he swore "In commencing the above action the name of Ravena Mana Navena Nagappa Pillay was omitted and it is necessary for the determination of the real matter in dispute that the said Ravena Mana Navena Nagappa Pillay be added as a plaintiff." On this summons, and by consent of the defendant, the Judge in Chambers, on 17th July 1936, ordered that Ravena Mana Navena Nagappa Pillay, the co-executor of the will of Moona Sidambaram Pillay deceased, be added as

a plaintiff herein and that the service of the writ on and the appearance entered by the defendant Sadhu Pakirswamy and all other proceedings herein do stand."

The defence which had been filed on 19th February 1936, was that the defendant had been in uninterrupted possession of all the land claimed by the plaintiff since the year 1916.

The case was tried by Mundell, Acting J. who held that the defendant had been in adverse possession from 30th June 1922. Many other difficult questions of law and fact were disposed of by Mundell, Acting J. but these were not in issue in this appeal.

The action was dismissed on the ground (*inter alia*) that the defendant was in uninterrupted possession from 30th June, 1922, and that the suit was not properly constituted until 17th July, 1936, when the second executor had been added as a plaintiff and that consequently the action was barred by the Limitation Ordinance, item 112 of the schedule, the defendant having been in uninterrupted possession for upwards of twelve years. This decision that the suit was not properly instituted dated January 1936 was the main ground of appeal.

The main point in this appeal was whether the second executor was a necessary party. Dr. Withers Payne argued that he was not a necessary party; that he was mistaken in taking the proceedings to add him as a party that the second plaintiff had not consented to be added (0.XVI. 11(s)) that the second plaintiff was immaterial to the action and that the period of limitation had not expired when the writ was issued in June 1933.

On the learned trial Judge's findings of fact (in respect of which there was no appeal) it is clear that these proceedings would have been in time had the action been properly commenced in 1933.

Although each executor has the whole legal estate of his testator vested in him and can do many things such as selling or mortgaging the estate for the purposes of administration without reference to his co-executors, the weight of authority strongly indicates that when executors sue as executors all the executors who have not renounced must be joined as plaintiffs. This proposition is borne out by such cases as *Offley* v. *Jenney and Baker* 3 Ch. R., 92, (21 English Reports 738), *Lakin* v. *Massie*, 3 L.J. Ex. 203, *Smith* v. *Smith*, Yelverton P. 130 (80 English Reports, 88) and *Webster and Woodye* v. *Spencer*, 3 B. and Ald. 360 (106 English Reports, 694). In this latter case each of the Judges emphasized the fact that when executors are suing as such, all must join. This case was relied on by the defendants in *Brassington* v. *Ault*, 2 Bing. 177 (130 English Reports, 274)—a case in which only three out of four executors sued. In that case the plaintiffs did not sue as executors though they were in fact executors. Best, C.J. said "In that case (*Webster* v. *Spencer*) the plaintiffs declared as executors, and when they do that, all (as Abbott, C.J. and Holroyd, J. said) must join. But that expression was referable to the form of action, which was an action expressly by executors; in such a case it is clear that all must join, because they claim their interests under the Will, not under the probate, and the right to sue is equal: but when the management is left with three and those enter into a contract, they may sue alone without styling themselves executors." And Park, J. "It would be impossible to question the rule, that in an action by executors, all the executors ought to be joined because the law has been so from the earliest times."

The present case is one brought by an executor as such and if Dr. Withers Payne's argument is sound what would be the position if the unjoined executor sold the property to the defendant while the suit was still pending?

It appears to us that the decision in *Seerangathuni* v. *Bava Vaithilingan Mudaliar*, All India Reports (1921) Madras 528, a case very similar to the present case, accords with the English law and is correct. It also supports the defendant's contention.

Dr. Withers Payne sought to distinguish *Seerangathuni's* Case, alleging that in India executors are creatures of statute and that they never had any common law rights, that they have not a joint and entire estate and that therefore in India all must sue. It appears from sections 211 and 311 of the Indian Succession Act that there is no substantial difference between executors in India and executors in England or in this Colony.

Dr. Withers Payne relied strongly on *Doe d. Stace* v. *Wheeler*, 15 M. and W. 623 (153 English Reports, 999). In that case the action was not by executors as such. It was by a fictitious plaintiff Doe who relied on his title, a lease to him by two out of three executors, a very different matter. Doe was the plaintiff, not the executors. The question was could two of three executors "the lessors of the plaintiff" give the plaintiff Doe a good title on which Doe could sue.

Although the report also says that "the plaintiffs sued as the executors of the Will of William Stace, the form of action with the fictitious Doe as the Plaintiff on the record cannot be overlooked. The defendant's unsuccessful argument was, not that all the executors were not plaintiffs, but that "the demise to the nominal plaintiff must be stated according to its legal effect; and on a demise by two of three executors, the estate would not pass from them jointly."

So far as the executors can be regarded as plaintiffs they were suing in the right of Doe in whom was the legal right to sue.

We were referred to *Dicey's* "Treatise on Parties to an Action" 1870 page. 493. The ficti-

tional nature of the action with Doe as plaintiff is not mentioned, and Dicey cautiously says "it seems.....that any one or more of them may recover." *Williams* on Executors 12th Ed., at page 548 puts it thus "when two out of three executors granted a lease of part of their testator's property, the whole passed to the lessee, and the two executors alone could maintain ejectment against him without joining the third."

Dr. Withers Payne argued that this passage does not correctly appreciate the point in *Doe d. Stace* v. *Wheeler* and that Williams should have said "one of several executors may recover the leasehold lands of their testator in ejectment."

Although Williams does not stress the fact that the plaintiff was Doe he rightly appreciates the fact that the ejectment was based on the lease to Doe and not on the will.

Dr. Withers Payne also relied on *Jones* v. *Smith*, 1 Ex., 831 and particularly a quotation therein from I Williams Saunders 291 h, in which he says that all executors ought to join. "But if one bring an action, either of debt upon bond or *assumpsit*, as well as tort, it seems settled that the defendant can only take advantage of it by pleading in abatement." He does not say that this applies in an action of ejectment. It was a decision on pleadings and it appears that if the plea in abatement had been taken the plea would have been good.

The plea in abatement has been abolished (XXII. r. 18) but this does not entitle a wrong or insufficient plaintiff to recover judgment. This is sufficiently plain from *Performing Rights Society Ltd.* v. *London Theatre of Varieties Ltd.* (1924) A.C. at page 14 to which Clark, J drew attention during the argument. "No action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case."

Herbert v. *Pigott*, 2 C. & M. 384 was a case on a preliminary point of pleading. Two executors who had proved sued for a debt alleged to be due to the testator. The defendant pleaded *puis darrein* continuance and release by the two executors who had not proved. The case was argued on the right to plead, and the sufficiency of, the release, Vaughan, B. said "they (the nonproving executors) ought to have been parties to the record." The appellant further relied on *Drage* v. *Hartopp*, 28 Ch. D. 414 as showing that all executors and particularly executors who are out of the jurisdiction (as Ravena Mana Navena Nagappa Pillay appears to be) need not be parties.

In that case the defendant applied to have added as a defendant a bankrupt executor who had absconded. In refusing the application Pearson, J. said "I have no power to add him as a plaintiff. If he is added as defendant he would be out of the jurisdiction, and I have no evidence of where he is, and there is no evidence that it would be possible for the Court to make an order for substituted service." In the present case there is no evidence that the second executor's whereabouts in India are unknown or cannot be ascertained, and there is no reason to think that an order for service out of the jurisdiction, or, if necessary, substituted service could not have been obtained.

Jeofrrey v. *Napper*, 2 Eq. Cases Abr. 464 was an action against executors only one of whom was within the jurisdiction, and he had the assets in his hands.

It was held that the absent executor was not a necessary defendant in an action for a debt due by the Estate. That was not a case of executors suing for possession of lands in which they alleged themselves to have title, and, until 1852 there was no provision for service out of the jurisdiction.

To have held otherwise would have defeated the plaintiff.

The weight of authority quoted earlier in this judgment indicates that in an action such as the present all executors must sue, and the Judical Committee of the Privy Council seems to have leaned to this view where in *Meyappa Chetty* v. *Supramanian Chetty*, (1916) A.C. at page 610 Lord Parker of Waddington said "it is doubtful whether one of two joint executors can properly institute proceedings on behalf of their Estate."

The third ground of appeal—that the learned trial Judge was wrong in law in holding that the second plaintiff appellant had been properly joined appears to us to be a point of no substance.

The argument was that the order adding the second plaintiff must be regarded as an order conditional upon a consent in writing by the second plaintiff being filed.

This very plaintiff is one of the appellants though according to the appellant's argument he was not a party.

Assuming this argument to be correct it does not appear to us to help either appellant. If the second appellant is not before this Court then all the necessary parties are not before the Court and if a new trial were ordered the new proceedings in which the second appellant was a party would be still more out of time than are the present proceedings.

The contention that the defendant should have taken proceedings to have the second plaintiff added as a party to proceedings to which it is alleged he was not a party appears to us to be unsubstantial both in law and on the merits.

The writ and the Statement of Claim each shew that only one of the executors—necessary parties to the action—was made a party and we see no reason why the defendant should take steps to remedy the plaintiff's proceedings which on the face of them are defective. The *Perform-*

ing Rights Society Case already referred to supports the view we take in the matter. Assuming that the statement in *James* v. *Smith*, 1 Ex. at 836 " one may sue alone, unless the non-joinder of his co-executor be taken advantage of by a plea in abatement " means that today a defendant must take out a summons to add the co-executor, it is clear that in the present case the defendant's solicitor drew the attention of the plaintiff's solicitor to the omission of the second executor and the plaintiff took steps himself to add the second executor. He cannot now blame the defendant for the ineffective (if they were ineffective) proceedings taken by the plaintiff to add his co-executor.

But do not consider that there was any duty on the defendant to move to add a plaintiff. In the old days a plaintiff could not plead in abatement of his own claim but a plaintiff can now move to have another person added as plaintiff. The old point of pleading so stressed by Dr. Withers Payne has no application at the present day.

In our opinion the second executor was a necessary party, judgment could not have been obtained by the first executor suing alone, (the writ and statement of claim disclosed the fact that there was a second executor); by the time the second executor was added (if he was properly added) and the suit properly instituted the statutory period of twelve years had expired (Limitation Ordinance, section 21); if he was not properly added the suit has not been properly instituted, and the limitation period has expired. The judgment of Mundell, J. was correct and this appeal is therefore dismissed with costs.

Nothing in this judgment is to be taken as deciding whether the occupation by the defendant enures for his own benefit or for the benefit of the Crown under colour of whose lease to him of a portion of Crown land the defendant appears to have occupied this contiguous land of which Moona Sidambaram Pillay held the title up to the time of his death.

Appeal dismissed.

Solicitors for the Appellants—*Drew & Napier.*

Solicitors for the Respondent—*Aubrey Davies & Co.*

[APPELLATE CRIMINAL JURISDICTION]

McElwaine, C.J.

February 10, 1936.

LIM LIM ..... **Appellant**

vs.

THE KING ..... **Respondent**

[SINGAPORE MAGISTRATE'S APPEAL No. 78 of 1937.]

Criminal law—road collision—contributory negligence—defence of—whether available—Penal Code (Chapter 20) s. 388.

Contributory negligence is no defence in a criminal case, but it may be weighed and considered if it has a bearing on the question whether the negligence (if any) of the prisoner was so gross, culpable or reckless as to disclose *mens rea* on his part or whether it was in any substantial sense a cause of the collision.

Semble, if the killed or injured person contributed to his own death or injury by his negligence, it may be taken into consideration when imposing punishment, but not where the prisoner's guilt is shared by another not being the injured party.

MAGISTRATE'S APPEAL.

The facts and arguments appear sufficiently from the Judgment.

Spenser Wilkinson for the appellant.

E. N. Taylor, Deputy Public Prosecutor, for the respondent.

Cur. Ad. Vult.

McELWAINE, C.J.—The appellant was convicted before E. E. Colman Esq., Fifth Magistrate, Singapore, on the following charge:—

> That he, on or about the 13th day of September 1936 at about 11-30 a.m. at Singapore caused grievous hurt to one, Tan Keong Lim, by doing an act, to wit, driving a motor van No. S.974 in Grove Road so negligently as to endanger the personal safety of others and thereby committed an offence punishable under section 338 of the Penal Code;

and was sentenced to three months simple imprisonment. He now appeals against conviction and sentence. At the same trial he was convicted on a charge of driving the motor van without a licence, but no appeal has been preferred in respect of this conviction.

The charge arises out of a collision which occurred at the intersection of Grove Road and Tanjong Katong Road. The appellant was driving the van along Grove Road in the direction of Singapore when he collided with a private motor car in which the injured lady Tan Keong Lim was a passenger. The car was travelling on Tanjong Katong Road in the direction of Amber Road and had got most of the way across Grove Road when the van struck the car on its left side. The point of impact is agreed to have been at a spot to the left of the middle line of Grove Road and slightly to the left of the middle line of Tanjong Katong Road, from the points of view of the van and car respectively. The van ended up by crossing the kerb at the South West corners of the intersection and going on to the grass. It came to rest heading nearly parallel to Grove Road. At or immediately after the collision the van must have been in some way diverted a little to its left. The rear of the van was 43 feet from the point of impact. The car ended up in a drain 53 feet from the point of impact. This drain was at the same corner as the van but definitely up Tanjong Katong Road in the direction in which the car had been travelling. The car however ended in the drain heading in the opposite direction to that in which it had been travelling. The engine of the van was pushed back which indicates that the collision took place at right angles.